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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
1998 Biennial Regulatory Review) MM Docket No. 98-43
Streamlining of Mass Media)
Applications, Rules and Processes)
To: The Commission)

Petition for Reconsideration and/or Clarification

This petition for reconsideration and/or clarification is submitted on behalf of (1) Claire B. Benezra, permittee of FM Station KPXC-FM, Indian Springs, Nevada ("KPXC"); (2) Farm Belt Radio, Inc. ("Farm Belt"), permittee of FM stations WSEY, Mt. Morris, Illinois, and WOXM, Oregon, Illinois; and (3) Maquoketa Broadcasting Company, licensee of KMAQ-FM, Maquoketa, Iowa ("KMAQ"). It addresses the revised policy regarding expiration of construction permits which was adopted in the Commission's Report and Order, FCC 98-281, released November 25, 1998 (hereinafter "the R&O"). The three petitioners are similarly, although not identically, situated, as they hold unbuilt construction permits which have been the subject of Commission proceedings looking toward significant modification of their broadcast authorizations. As a result of unresolved proceedings at the Commission, petitioners have been unable to complete construction and start broadcast operations, and have been forced to seek extensions of their permits.¹

¹ As will be discussed in more detail infra, KMAQ-FM holds a construction permit granted by the Commission based upon a finalized rule making proceeding instigated by unrelated parties, yet it is unable to implement its permit due to another station's failure to implement its granted rule making modification.

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It is requested herein that the Commission state that the pendency of a rule making proceeding involving an unbuilt construction permit tolls the three-year period for construction which was incorporated into the rules in the R&O.

The Commission encourages the filing of petitions for rule making by permittees seeking to improve or upgrade their facilities. It has often found that the public interest will be served by adopting proposals which will promote the efficient use of the spectrum, will provide communities lacking local service with stations of their own, or will provide other public interest benefits. In FM Channel and Class Modification by Application, 8 FCC Rcd 4735 (1993), the Commission created a one-step upgrade policy to expedite certain of the improvements. However, when another station is required to change frequency, or a change in the city of license is sought, the permittee must file a petition for rule making and go through a notice and comment cycle before filing an application for construction permit.

Upon receipt of a simple straight forward petition for rule making seeking to modify an FM (or television) allotment, the Commission may issue a Notice of Proposed Rule Making two to three months after the petition is filed. If the petition raises difficult or unusual problems, the wait may be much longer.

The Notice generally provides about six weeks for comment on the proposal, with two additional weeks for reply comments.

Assuming no counterproposals or objections which require extraordinary effort are filed, the Commission will release a

report and order about four months after the close of the comment period, making the change effective approximately 90 days thereafter.² Once the change in the Table of Allotments has become effective, the permittee may file its application to modify facilities. Such application generally takes a minimum of four months to be granted by the Audio Services Division. Hence, even in the best of cases, it will take about 14 months from the filing of the petition for rule making until a construction permit to modify the station's facilities in accordance with the rule making result is granted. The time period may easily be much longer, if there is a counterproposal or other objection to the requested change in the Table of Allotments, or if the petition or subsequent construction permit application is contested or presents unusual concerns to the Commission. The length of time taken by the Commission's staff to resolve rule making petitions and minor modification applications is wholly beyond the control of the permittee.

The R&O seeks to provide an unfettered three years to complete construction. A 14-month period from the filing of the petition to grant of the modified construction permit represents a significant portion of the three-year life of the permit. Any longer period

² See for example, MM Docket 98-52, which resulted in FM construction permit WWFY being upgraded from Class A to Class C3 and changing its community of license from Hague, NY to Addison, VT. The initial petition for rule making was filed on February 20 1998; the Notice of Proposed Rule Making was released April 17, 1998, and the change became effective December 14, 1998. This 10-month period about as short a time as can be expected, even for uncontested proposals.

may severely impact the permittee's ability to complete construction within the three-year period. Failure to toll the construction period to account for the time the Commission requires to consider the proposed change(s) may disserve the public interest by discouraging permittees from making proposals to maximize service or otherwise better serve the public interest.

It is true that in many cases a permittee may construct its station according to its construction permit while awaiting Commission action on its rule making petition. However, such construction may entail needless effort and expense if the Commission's ultimate action requires a change in transmitter site, for example. Additionally, as discussed in more detail below, construction under the permit may defeat the goal of the rule making proceeding. A proposal to change the community of license of an unbuilt construction permit from a community without local service to a larger community similarly without local service, may be considered only before broadcast operations at the smaller community begin. Hague, NY and Addison, VT, supra. In any event, the Commission has previously held that a permittee facing a possible change in facilities from an unresolved rule making proceeding is justified in delaying construction of its station until the matter is concluded. Letter to John S. Neely, Esq., (WDKR(FM) (Acting Chief, ASD, November 9, 1995) and precedents cited therein.

KPXC-FM:

KPXC's construction permit was recently extended until July 6,

1999. On that date, it will expire under the policy established in the R & O, if construction of the station has not been completed. However, it is Commission inaction for over two years which has dissuaded Ms. Benezra from putting KPXC-FM on the air.

Of significance for this petition, on August 16, 1996, the Commission released its Notice of Proposed Rule Making, DA 96-1271, MM Docket 96-171, recognizing the public interests benefits flowing from KPXC-FM's petition for rule making³. Therein the Commission proposed to modify the Indian Springs allotment to a full Class C facility. To accommodate KPXC-FM's upgrade, Stations KHYZ and KGMN would have to change their frequency of operation by one channel and KPXC-FM would have to change its transmitter site. Ms. Benezra committed to reimbursing the legitimate costs of such frequency changes and to promptly implementing the upgrade when it would become effective. Comments on the proposal were due October 18, 1996.

Ms. Benezra timely filed supporting comments. However, KHYZ and KGMN jointly submitted a counterproposal supporting the upgrade, but offering an alternative which would not require these stations to change frequency. The counterproposal would change significantly the permissible area in which KPXC-FM could locate its transmitter site.⁴ KPXC-FM opposed the counterproposal in timely-filed reply comments.

³ Benezra's petition was filed June 28, 1996; an erratum was filed July 9, 1996.

⁴ Public notice of the counterproposal was not given until July 28, 1997. Report 2213, Mimeo 75517.

On April 17, 1998, having concluded that KPXC's proposal would better serve the public interest, the Policy and Rules Division released a Report and Order granting Ms. Benezra's petition (DA 98-689). Ms. Benezra immediately engaged her consulting engineer to begin preparing her modification application. However, only a few days before the effective date of the Report and Order, on May 27, 1998, the Policy and Rules Division, on its own motion, rescinded its action, indicating that a revised Report and Order would be issued. (DA 98-1003) To date, more than two years and four months from the release of the NPRM, there has been no definitive Commission action on KPXC's upgrade.

The R&O states that permittees will have no more than three unfettered years from the initial grant of the construction permit in which to complete construction and file an application for license. Additional time will be given in only two cases, (1) where a natural disaster, such as a flood, tornado, hurricane, or earthquake, occurs, or (2) where construction is unwise due to the pendency of court or Commission appeal processes. The Commission distinguished between delays involving the initial zoning hearing, which would not serve as a basis for additional time, and an appeal therefrom, which would. The Commission omitted any mention of rule making proceedings which affect the permit in question.⁵

In the case of KPXC, the Commission tentatively concluded in

⁵ A possible analogous situation was addressed in note 148, wherein the Commission stated that "the mere pendency of a request by an AM permittee to migrate to the AM expanded band does not constitute a qualifying encumbrance."

its NPRM that an upgrade of that station to Class C would serve the public interest. No comments in opposition to the upgrade were filed; the sole controversy revolves around the reference point and whether other stations will have to move one channel over. It is most likely, therefore, that the Commission will act to upgrade KPXC at some time in the future. Yet, under the newly-adopted policy, unless it is clarified or modified as requested herein, Ms. Benezra would have to construct her station as a Class A facility, and later tear it down to rebuild it at another location as a Class C facility. The Commission's dilatoriness in finalizing the Indian Springs rule making proceeding is the sole reason why KPXC has not begun broadcasting. Under such circumstance, it is manifestly unfair to penalize Ms. Benezra, and take away funds which otherwise could be used to provide programming serving the needs and interests of her listeners, by making her expend unnecessary effort and money merely to keep her permit alive.

As noted above, the Commission has previously considered the pendency of a rule making proceeding to constitute good cause for extending a construction permit. In apparently modifying this policy, the Commission did not explain why it would no longer consider the pendency of a rule making proceeding adequate grounds to extend a construction permit. The time taken by the Commission to process a rule making petition as well as the time to act on an application is beyond a party's control, and should not be counted against the three-year period given the construction permit.

Although the Commission may change its prior policy, it must

articulate valid reasons for doing so, and the new rule or policy may not be arbitrary. The FCC's decision must be "a reasonable exercise of its discretion, based on consideration of relevant factors, and supported by the record." California v FCC, 905 F 2d. 1217, 1230 (9th Cir. 1990). The agency must provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co. 463 US 29, 43-44 (1983). "If the record reveals that the agency has 'failed to consider an important aspect of the problem' or has 'offered an explanation for its decision that runs counter to the evidence before [it],'" the agency is in violation of the Administrative Procedure Act. California v. FCC, 39 F3d 919 (9th Cir. 1994).

In neither its NPRM⁶ nor its R&O in MM Docket 98-43 did the Commission address situations in which a Commission proceeding directly affecting the permittee remains pending for an inordinate period of time, such as is the case with KPXC. Thus, applying the new policy to her and other permittees who are awaiting Commission action in a rule making proceeding, may be considered arbitrary and capricious. There is no true difference between the situation of a permittee whose Commission grant has been appealed, for whom the three-year construction period is tolled under the new policy, and a permittee whose ultimate transmitter site, frequency, etc. is in doubt pending Commission action. In both cases, requiring the permittee to construct in accordance with the issued permit is

⁶ 13 FCC Rcd 11349 (1998) (hereinafter "NPRM").

unwarranted. The Commission should clarify that failure to construct because the Commission itself has not acted on an applicable rule making proceeding in a timely fashion, is reason to extend a construction permit.

In its NPRM, at paragraph 54, the Commission stated that its purpose in providing a limited period in which to construct is "to strike a balance between our fundamental interest in expediting new service to the public and in preventing the warehousing of scarce spectrum and our recognition that there are sometimes legitimate obstacles which prevent the rapid construction of broadcast facilities." As noted above, the Commission has previously held that an ongoing rule making proceeding involving the permit constitutes a "legitimate obstacle" to construction. However, its R&O it failed to address explicitly whether it was modifying that holding, or if it were, the basis therefore.

The R&O held that zoning delays would not serve as sufficient grounds for extending the permit beyond the three-year period. It stated, at paragraph 86, that "[T]he three-year period provides ample time to complete this (zoning) process and construct the station or choose a new site free from zoning difficulties." This conclusion stems from the NPRM's tentative conclusion in paragraph 65 that "zoning delays can be overcome and construction can be completed within the proposed three-year construction period if a permittee pursues the zoning process diligently."

Although permittees may be able to obtain relatively prompt zoning decisions by diligently pursuing their applications for such

approval⁷, there is little which permittees can do to expedite Commission action on rule making proposals, short of obtaining writs of mandamus from courts of competent jurisdiction. Moreover, even after the finalization of the rule making proceeding, the permittee will have to seek and receive a modified construction permit specifying the new facilities before it may commence construction. In many parts of the country, weather conditions limit the portion of the year in which construction may occur. All these factors militate against strict enforcement of the three-year construction period in situations where the Commission has to resolve a rule making proceeding. Ms. Benezra, and similarly situated permittees, are at the mercy of Commission action which may not be forthcoming for a considerable period of time. They should not be forced into choosing between risking their authorization or wasting effort and money simply because the Commission does not act promptly.

Farm Belt:

Farm Belt's situation is somewhat different from that of KPXC-FM. Farm Belt has been seeking a change in the FM Table of Allotments, Section 73.202 of the rules, with respect to its two unbuilt construction permits, WSEY and WOXM. At present, WSEY is authorized on Channel 239A at Mt. Morris, Illinois, and WOXM is authorized on Channel 291A at Oregon, Illinois. However, WOXM, a

⁷ Petitioners have no knowledge of the period various zoning boards may take to act on a permittee's request. However, the Commission itself noted one instance of a ten-year delay. R&O at note 144.

grandfathered facility, is limited to 3kW ERP, as it is short-spaced according to the current separation requirements. WSEY and WOXM are the only broadcast stations or allotments at their respective communities. Mt. Morris and Oregon are less than ten miles apart, and the two stations have the same transmitter site.

Since 1996, Farm Belt has been seeking Commission approval to change the Table of Allotments so as to add a first service to Genoa, Illinois. The only way this could be accomplished is to delete the Mt. Morris allotment, add Channel 292A at Genoa, Illinois, and change the Oregon allotment to Channel 239A. Genoa, located about 60 km from Oregon, is more populous than Mt. Morris, although smaller than Oregon.⁸ Hence, the goals of Section 307(b) of the Communications Act would be met by replacing a channel in Mt. Morris with one in Genoa. Hague, NY and Addison, Vt., supra.

However, the Commission has failed to rule definitively on Farm Belt's rule making proposal to date.⁹ On November 28, 1997, Farm Belt submitted its most recent proposal to place a station into Genoa, requesting two simultaneous channel changes; WOXM would move from Oregon to Genoa, changing one channel from 291A to 292A, and WSEY would simultaneously move to Oregon from Mt. Morris, remaining on Channel 239A.¹⁰

⁸ None of the communities involved is in an urbanized area.

⁹ The Policy and Rules Division rejected Farm Belt's prior petitions to place a first service into Genoa for reasons not applicable to the issue raised herein.

¹⁰ As noted above, WSEY's transmitter site would not change as a result of its move to Oregon.

To date, there have been no comments filed on Farm Belt's petition, and the Commission has taken no action thereon, despite Farm Belt's diligent attempts to obtain a ruling.

It is Commission policy to entertain proposals to remove the sole broadcast service from a community only in rare circumstances. Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O"), 4 FCC Rcd 4870, 4874 (1989), recon. granted in part ("Change of Community MO&O"), 5 FCC Rcd 7094 (1990).¹¹ However, if the sole allotment has not yet begun broadcasting, there has been no service and the Commission will consider deletion of the sole allotment to provide a first service to a larger community. Hague, NY and Addison, VT, supra. Thus, Farm Belt's proposal to allot a new station at Genoa, Illinois, would likely not be considered if WSEY begins broadcasting at Mt. Morris, Illinois. Were the Commission to refuse to extend a construction permit in the face of rule making proceedings, Farm Belt would be forced to place WSEY on the air at Mt. Morris, thus eliminating the opportunity for a new station at Genoa, even though Genoa is favored over Mt. Morris under Section 307(b) of the Communications Act.

Thus, under the newly enunciated policy, the mere passage of time, rather than a reasoned analysis of the substantive issues,

¹¹ "[i]n general, we do not believe that the public interest would be served by removing a community's sole local transmission service merely to provide a first local transmission service to another community. See Ardmore, Oklahoma, and Sherman, Texas, 6 FCC Rcd 7006 (1991) and Llano and Marble Falls, Texas, 10 FCC Rcd 4913 (1995).

would determine the outcome of Farm Belt's petition. The Commission should not permit the public interest to be subservient to its administrative delay. Farm Belt's position provides another basis for tolling the three-year construction period during Commission rule making proceedings.

KMAQ-FM:

KMAQ-FM presents yet another situation where the Commission's inaction affects the station's ability to construct its station. KMAQ-FM is licensed as a Class A station on Channel 237A, at Maquoketa, Iowa. On February 7, 1995, the Commission granted its application to change to Channel 236A and amended its Table of Allotments to reflect that change. KMAQ-FM's permit contained a condition that Station WZZT, Morrison, Illinois, would have to commence program tests on Channel 274A before KMAQ-FM could begin operation on Channel 236. Pursuant to the Commission's Report and Order in MM Docket 89-521, 9 FCC Rcd 1937 (PRD 1994), WZZT was ordered to modify its license to specify operation on Channel 274A. The allotment of Channel 274A to Morrison had become final and not subject to reconsideration or review prior to the grant of KMAQ's application.

KMAQ-FM has completed all possible construction other than the modification of its transmitter, antenna and FM monitor. It has been prepared to make these changes for over three years. However, to date, WZZT has not constructed its modified facilities. As a result of the condition on its construction permit, KMAQ-FM has thus had to extend its permit every six months, for its inability

to construct is clearly beyond its control. Despite KMAQ-FM's repeated urging of Commission staff, the Commission has taken no steps to enforce its order that WZZT implement its new allotment. Under the new policy, however, KMAQ-FM may lose its construction permit at the end of its current term on March 17, 1999, for its situation is not recognized in the R&O.

There is no rational basis to cancel KMAQ's construction permit, or any construction permit, when the station has expended considerable resources in obtaining and renewing the permit, which was found by the Commission to be in the public interest, and it is the Commission's own regulatory delays which have prevented KMAQ from finishing construction pursuant to the terms and conditions of the permit.

Accordingly, the Commission must clarify its R&O, or grant reconsideration, to the extent of tolling the three-year construction period when regulatory delays prevent or mitigate against station construction.

Respectfully Submitted,

CLAIRE BENEZRA

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MAQUOKETA BROADCASTING COMPANY

By 
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January 15, 1999

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SUMMARY

Three holders of FM construction permits seek a ruling that the three-year period for completing construction is tolled while the Commission considers a rule making proposal which would significantly modify the authorization. They describe their own situations in which the Commission has failed to act to resolve the uncertainty for a period of years, and point out that requiring construction under the circumstances would be wasteful, would eliminate the possibility of accomplishing the desired changes, or are not permitted at all. They conclude that failure to toll the construction period during the pendency of a rule making proceeding represents a significant change in Commission policy which was not raised in the notice of proposed rule making and its adoption may thus be inappropriate.

CERTIFICATE OF SERVICE

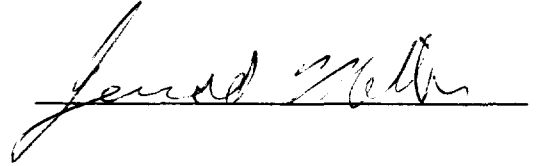
I hereby certify that on this 15 day of January, 1999, a copy of the foregoing document was placed in the United States mail, first class postage prepaid, addressed to the following:

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A handwritten signature in cursive script, appearing to read "Leonard Zeller", is written over a horizontal line.